Supreme Court, U.S.
FILED

05-591 NOV - 7 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

CITY OF VANCOUVER, WASHINGTON, and
CLARK COUNTY, WASHINGTON,

Petitioners,

v.

WESTERN STATES PAVING CO., INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ALISON J. CHINN, Assistant City Attorney
(*Counsel of Record*)
210 E. 13th Street, 2nd Floor
Vancouver, Washington 98660-3231
(360) 696-8251 Fax: (360) 735-8851

Attorney for Petitioner City of Vancouver, Washington

CURT WYRICK, Chief Deputy
Clark County
1013 Franklin Street
Vancouver, Washington 98660-3039
(360) 397-2478 Fax: (360) 397-2184

Attorney for Petitioner Clark County, Washington

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Under stare decisis, did the Ninth Circuit Court of Appeals err when it overturned the District Court's summary judgment dismissal in favor of the City of Vancouver ("City") and Clark County ("County") petitioners even though respondent Western States failed to raise or argue any claim or error in its opening brief regarding the District Court's granting of summary judgment to the petitioners.

2. Whether the Ninth Circuit Court of Appeals erred when it failed to consider petitioners' alternative ground for summary judgment, which was supported by undisputed facts.

PARTIES TO THE PROCEEDING

The Parties to the Proceeding are:

Petitioner:	City of Vancouver, a municipal corporation Alison J. Chinn Assistant City Attorney Counsel of Record for Petitioner City of Vancouver
	Clark County, a municipal corporation Curt Wyrick Chief Deputy for Petitioner Clark County
Respondents:	Western States Paving Co., Inc. Gary E. Lofland Attorney for Respondent Western States Paving Co., Inc.
	Washington State Department of Transportation; Douglas MacDonald, Secretary of the Washington Department of Transportation Steve E. Dietrich Assistant Attorney General Attorney for State Respondents
	United States of America; United States Department of Transportation; Federal Highway Administration Lisa Stark U.S. Attorney Attorney for Federal Respondents

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS BELOW	1
BASIS FOR SUPREME COURT JURISDICTION	1
STATEMENT OF THE CASE	2
A. Proceedings and Rulings in the District Court	2
B. Proceedings and Rulings in the Court of Appeals	5
C. Issues Created by the Court of Appeals' Decision Require This Court's Action	9
ARGUMENT	10
A. The Court of Appeals Erroneously Allowed the Appellant to Prevail on an Issue That Was Not Properly Raised on Appeal	10
1. The Court of Appeals' Decision Failed to Follow Well Established Law of the Ninth Circuit That an Appellant Waives an Issue That is Not Properly Raised on Appeal	11
2. The Court of Appeals' Decision in This Case is Internally Inconsistent Because the Court of Appeals ruled Two Different Ways on an Identical Issue	13

TABLE OF CONTENTS – Continued

Page

3. The Doctrine of Stare Decisis Requires the Court of Appeals Find Respondent Western States Waived its Appealable Issues Regarding Petitioners City and County 15

B. The Court of Appeals' Decision Does Not Follow Other Ninth Circuit Caselaw Because it Failed to Consider the City and County's Basis for Summary Judgment on Compensatory Damages 16

1. There is Undisputed Evidence Which Supports Summary Judgment Dismissal.... 16

a. The City and County's Motions for Summary Judgment Before the District Court Provided the Basis for Dismissal of the Compensatory Damages 17

i. Summary Judgment Standard 17

ii. Western States Did Not Prove an Essential Element of its Claim for Compensatory Damages Against the City and County 18

2. The Renewed Arguments for Summary Judgment Dismissal Should Have Been Considered by the Court of Appeals to Uphold the Summary Judgment Dismissal of the City and County 20

C. The Decision in this Case Involves a Question of Exceptional Importance in that the Result, If Undisturbed, Will Lead to Inconsistency in the Law of the Ninth Circuit and Allow an Opinion that is Internally Inconsistent and Contrary to the Doctrine of Stare Decisis 23

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Alaska Ctr. For Env't v. United States Forest Serv., 189 F.3d 851 (9th Cir. 1999) 11

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) 18

Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096 (9th Cir. 1999) 12

Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036 (9th Cir. 1999) 12

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) 17, 20

FDIC v. Garner, 126 F.3d 1138 (9th Cir. 1997) 13

Greenwood v. FAA, 28 F.3d 971 (9th Cir. 1994) 12

Harkins Amusement Enterprises, Inc., v. General Cinema Corp., 850 F.2d 477 (9th Cir. 1988) 20, 21

Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001) 15

Hell's Angels Motorcycle Corp. v. McKinley, 360 F.3d 930 (9th Cir. 2004) 22

Helvering v. Gowan, 302 U.S. 238, 58 S. Ct. 154, 82 L. Ed. 224 (1937) 22

Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996) 13

International Union of Bricklayers and Allied Craftsmen Local Number 20 v. Martin Jaska, Inc., 752 F.2d 1401 (9th Cir. 1985) 11

Lujan v. Natl. Wildlife Fed'n., 497 U.S. 871, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) 18

TABLE OF AUTHORITIES – Continued

Page

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) 17

Miller v. Fairchild Indus., Inc., 797 F.2d 727 (9th Cir. 1986) 11

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970) 15

Moran v. State of Washington, 147 F.3d 839 (9th Cir. 1998) 20

Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004, 113 S. Ct. 1645, 123 L. Ed. 2d 267 (1993) 11

Paracor Finance v. General Elec. Capital Corp., 96 F.3d 1151 (9th Cir. 1996) 11

Pierce v. Multnomah County, 76 F.3d 1032 (9th Cir. 1996), *cert. denied*, 519 U.S. 1006, 117 S. Ct. 506, 136 L. Ed. 2d 397 (1996) 13

Pritikin v. Department of Energy, 254 F.3d 791 (9th Cir. 2001), *cert. denied*, 534 U.S. 1133, 122 S. Ct. 1076, 151 L. Ed. 2d 977 (2002) 22

Smith v. Marsh, 194 F.3d 1045 (9th Cir. 1999) 12

T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc., 809 F.2d 626 (9th Cir. 1987) 18

Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica, 614 F.2d 1247 (9th Cir. 1980) 22

United States v. Dunkel, 927 F.2d 955 (7th Cir. 1991) 12

TABLE OF AUTHORITIES – Continued

Page

Wallis v. J.R. Simplot Co., 26 F.3d 885 (9th Cir. 1994) 22

Western States Paving Co. Inc. v. Washington State Dep't of Transportation, 407 F.3d 983 (9th Cir. 2005) 11, 22

Western States Paving Co. Inc. v. Washington State Dep't of Transportation, No. CV-0005204-RBL, (West. D. Wash. Filed Nov. 15, 2000) 1

Zukle v. Regents of Univ. of Cal., 166 F.3d 1041 (9th Cir. 1999) 12

STATUTES:

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 2

28 U.S.C. §1343 2

28 U.S.C. §2101(c) 1

28 U.S.C. §2201 2

42 U.S.C. §1981 18

42 U.S.C. §1983 ..... 2, 18

42 U.S.C. §2000(d) 18

Transportation Equity Act for the 21st Century ("TEA-21") Pub. L. 105-178, 112 Stat. 107 (1998) 20

OTHER AUTHORITIES:

U.S. Supreme Court Rule 13.1 1

Federal Rule of Civil Procedure 56 17

OPINIONS AND ORDERS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 407 F.3d 983 (9th Cir. May 9, 2005). App. 1-39.

The opinion of the United States District Court Western District of Washington at Tacoma, entered September 3, 2003, granting summary judgment dismissal to the City and to the County petitioners is unreported. App. 44-71.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment on May 9, 2005. App. 40. The City and County seek review of that judgment on a writ of certiorari.

In June 2005, both the City and County timely filed petitions for panel rehearing in the Court of Appeals. App. 80; App. 74. On August 8, 2005, with a vote of 2-1, the Court of Appeals filed an order denying panel rehearing. App. 72-73. On August 22, 2005, the Court of Appeals filed the judgment affirming the District Court in part, reversing in part, and remanding the case. App. 40.

On September 13, 2005, the order of the District Court granting partial summary judgment on the issue of liability against the City and County was entered. App. 41-42.

The present petition is timely filed under 28 U.S.C. §2101(c) and under Rule 13.1 of this Court.

This Court has jurisdiction under 28 U.S.C. §1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

STATEMENT OF THE CASE

The basis for federal jurisdiction in District Court stems from respondent's civil rights claims under 42 U.S.C. §1983, and 28 U.S.C. §§1331, 1343, and 2201.

The Court of Appeals erroneously held the City and County responsible for compensatory damages simply because the City and County complied with the requirements of a federal program, that was applied by the state, in order to secure road construction funds. The Court of Appeals in this decision committed two fundamental errors in its ruling. First, the Court of Appeals failed to follow the basic legal tenet that an appellant waives an issue on appeal if the appellant does not raise the issue in the appellant's initial or opening brief. Second, the Court of Appeals failed to consider an alternative ground for summary judgment in favor of the City and County that was supported by undisputed facts.

A. Proceedings and Rulings in the District Court.

Respondent Western States Paving Co., Inc. ("Western States") was unsuccessful in its bid to obtain the paving subcontract on three federally funded highway projects awarded by the City and County. Western States' amended complaint alleged that its constitutional rights were violated when it was wrongly denied subcontracts on three federally funded highway projects because it did not

qualify as a disadvantaged business enterprise ("DBE"). App. 244-250. The DBE qualification was a requirement of the federal highway funding, which was distributed and administered by the Washington Department of Transportation (WSDOT). App. 246; App. 242-243. Western States also alleged that the actions of the State, City, and County violated the laws and Constitution of the state of Washington. App. 249. Western States sought a declaratory judgment holding the federal highway funding minority preference program to be in violation of equal protection under the U.S. Constitution and for an award of monetary damages. App. 249-250.

The City and County moved the District Court for entry of an order dismissing Western States' claims for compensatory damages because there was no evidence to support Western States' conclusion that the City and County's inclusion of the DBE goals in their contracts was the result of racial or gender-based animus or intentional discrimination. App. 237-240; App. 227-234. The only reason DBE goals were utilized by the City and County on these projects was because it was required by WSDOT as a condition of the distribution of the federal highway funding. App. 243; App. 236. The City and County did not have their own DBE programs or requirements related to the awarding of these contracts. App. 243; App. 235-236. The City's motion for summary judgment was supported by the affidavit of the City's Procurement and Contracts Manager. App. 241. The County's motion for summary judgment was supported by the declaration of the County's Director of Public Works. App. 235. The facts presented in support of the City and County's motions for summary judgment were not disputed by Western States in its Memorandum in Opposition of City and County's Summary

Judgment.[1] The City and the County each also filed reply memoranda/briefs in support of their motions for summary judgment defending their positions.[2]

On September 3, 2003, the District Court granted the City and County's motions for summary judgment dismissal. App. 44-71. The District Court ruled that the federal highway funding minority preference program and its regulations were constitutional on their face and as applied by the State. App. 70. The District Court dismissed Western States' claim for compensatory damages because it hinged on the argument that the federal highway funding preference program was unconstitutional, and the District Court had just held the program and its regulations were constitutional on its face and as applied. App. 70-71. The District Court's order did not discuss the City and County's argument that they were entitled to summary judgment dismissal because there was no evidence of racial or gender-based animus or intentional discrimination. App. 70-71. The District Court dismissed Western States' state law claim. App. 71. The judgment granting summary judgment dismissal to all defendants was entered on September 9, 2003. App. 43.

---

[1] *See* Western States' Memorandum in Opposition of City and County's Summary Judgment, App. 222-226.

[2] *See* City's Reply Memorandum in Support of Motion for Summary Judgment, App. 214-221, and County's Reply Brief in Support of Its Motion for Summary Judgment, App. 208-213.